

**BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

IN THE MATTER OF:

**CLEANUP AND ABATEMENT ORDERS
NUMBERS R9-2006-0101 & R9-2006-0102**

SUPPLEMENTAL INFORMATION AND CLARIFICATION

to

**PETITION FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY
CONTROL BOARD ACTION AFFIRMING CLEANUP AND
ABATEMENT ORDERS R9-2006-0101 & R9-2006-0102**

And

REQUEST FOR STAY

JULY 27, 2007

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Bill & Heidi Dickerson
Larry & Penny Gunning
Perry and Papenhausen, Inc.

I.

INTRODUCTION

On behalf of Larry and Penny Gunning, Bill and Heidi Dickerson, and Perry and Papenhausen, Inc. ("Petitioners"), on July 12, 2007 the law offices of Oppen & Varco submitted a "Petition for Review of San Diego Regional Water Quality Control Action Affirming Cleanup and Abatement Orders R9-2006-0101 & R9-2006-0102 and Request for Stay" ("Petition"). In a letter dated July 13, 2007, Staff Counsel to the State Water Resources Control Board ("SWRCB"), Ms. Elizabeth Miller Jennings, replied that the Petition required the submittal of supplemental information by July 27, 2007.

Accordingly, herein please find "Supplemental Information and Clarification to Petition for Review of San Diego Regional Water Quality Control Board Action Affirming Cleanup and Abatement Orders R9-2006-0101 & R9-2006-0102 and Request for Stay" ("Supplement"). This Supplement provides any information missing from the Petition, and organizes the information in a way that directly matches the requirements for Petitions set forth in Title 23, Section 2050 of Cal. Code of Regulations (providing rules for Petitions for Review) and Title 23, Section 2053 (providing rules for Petitions for Stay).

II.

SUPPLEMENTAL INFORMATION AND CLARIFICATION TO PETITION FOR REVIEW

A. Name, address, telephone number and e-mail address (if available) of the petitioner.

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505 First Street
Coronado, California 92118

Bill and Heidi Dickerson
501 First Street
Coronado, California 92118

Perry and Papenhausen, Inc.
9748 Los Coches Rd Ste 3
Lakeside, California 92940

Petitioners may be contacted by telephone or e-mail through the offices of Oppen & Varco LLP at 619.231.5858 or at roppen@envirolawyer.com.

B. The action or inaction of the Regional Water Board being petitioned, including a copy of the action being challenged or any refusal to act, if available.

Exhibit 1 attached hereto provides a "Summary of Board Actions and Proceedings at the June 13, 2007 Board Meeting" of the San Diego Regional Water Quality Control Board. Page 1 of this summary documents the San Diego Regional Water Quality Control Board's ("RWQCB") action to affirm Cleanup and Abatement Orders R9-2006-0101 and R9-206-0102 ("CAOs"). Although the Petition did not attach copies of the RWQCB summary, page 1 of the Petition expressed the Petitioner's wishes to challenge this action before the SWRCB. For the sake of clarity, Petitioners challenge the RWQCB's action to affirm CAOs R9-2006-0101 and R9-2006-0102. Exhibit 1 documents the RWQCB's affirmation.

C. The date the Regional Water Board acted.

As explained in page 1 of the Petition and as noted in Exhibit 1 attached hereto, the RWQCB's now-challenged action occurred on June 13, 2007.

D. Statement of the Reasons the action was inappropriate or improper.

Page 2 of the Petition summarizes the reasons explaining why the RWQCB's action was inappropriate and improper, and provides the following summary.

The RWQCB: 1) incorrectly and without substantial evidence concluded that the Petitioners' actions discharged waste to waters of the state; 2) incorrectly and without substantial evidence found that Petitioners created a condition of nuisance or pollution; and 3) improperly issued cleanup and abatement demands in reliance on such incorrect findings.

E. How the Petitioners are aggrieved.

Page 2 of the Petition provides the following statement concerning the reasons why Petitioners would be aggrieved by the RWQCB's action.

Because of the RWQCB's improper action, Petitioners would be substantially aggrieved. Petitioners would be required to place thousands of pounds of rock fill, or "rip rap," on the shore of the San Diego Bay and could be ordered to remove a retaining wall on their private property or perform efforts to justify to the RWQCB that such removal is not necessary.

The RWQCB's Orders would force the Petitioners to incur substantial costs and effort against their will. Furthermore, the placement of "riprap" would create a safety hazard to persons who might attempt to walk on the rocks.

F. The action Petitioners request the State Water Board to take.

Page 3 of the Petition provides the following statement concerning the actions which the Petitioners ask the SWRCB to take.

Petitioners request the SWRCB to find that the RWQCB improperly affirmed the CAOs, and to rescind the CAOs. More specifically, Petitioners request that the SWRCB find:

- 1) Petitioners' retaining wall does not qualify as a "waste" nor a "discharge of waste" under the meanings given to those terms by the California Water Code.

2) Natural sand adjacent to Petitioners' retaining wall does not qualify as a "waste" nor a "discharge of waste" under the meanings given to those terms by the California Water Code.

3) Petitioners have not caused a "condition of pollution or nuisance" under the meanings given to those terms by the California Water Code.

G) A statement of points and authorities for any legal issues raised in the petition, including citations to documents or hearing transcripts that are referred to.

The Petition provides a statement of point and authorities, especially in sections III through V, respectively titled "Factual Background," "Summary of the RWQCB's Evidence," and "Argument." Thus, the Petition fully explains the legal and factual issues which form the basis for the Petition.

The Petition does not cite to hearing transcripts or an administrative record. Within the requisite 30 days for filing a petition after the June 13, 2007 hearing, the RWQCB had not ordered transcripts of the hearing and the Petitioners had not received transcripts. We note that pursuant to Cal. Code. Reg. § 2050.5, the RWQCB will have thirty days to respond to the Petition and that during this time it "shall file the administrative record ... including a copy of the tape recording of the regional board action, or a transcript, if available." At that time, Petitioners would gladly cite to the administrative record and/or hearing transcripts.

H) A statement that copies of the Petition have been sent to the Regional Water Board and to the discharger, if different from the Petitioner.

Page 2 of the Petition provides that "this petition was delivered to the RWQCB contemporaneously with service upon the SWRCB." Accordingly, the RWQCB sent an e-mail to our offices on July 12, 2007 confirming their receipt of the Petition. (Exhibit 2.)

The Supplement provided herein will be delivered to the RWQCB contemporaneously with service upon the SWRCB.

- I) A statement that the issues raised in the petition were presented to the regional board before the regional board acted.**

Page 2 of the Petition provides that "issues raised in this petition were raised before the RWQCB during oral presentations at a RWQCB hearing held on June 13, 2007, and in written correspondence delivered to the RWQCB."

III.

PETITION FOR STAY SUPPLEMENTAL INFORMATION AND CLARIFICATIONS

Section VI of the Petition, titled "Request for Stay" explains that

Petitioners request that they be granted a stay from compliance with the terms of the CAO while this matter is considered by the SWRCB. Significant questions of law and fact are presented by this Petition, and both legal and equitable reasons support maintaining the *status quo ante* while these issues are analyzed.

- A. Lack of substantial harm to other interested persons and to the public interest if a stay is granted**

Section VI of the Petition additionally provides that:

A stay would not impact any impairment of the quality of the waters of the state, as no such impairments are occurring. As illustrated and described in the Declaration of Counsel in Support of a Petition for Stay, [attached as Exhibit A to the Petition] a stay would allow the public, which uses and supports the existence of the sandy beach, continued access to this community resource while the issues presented by this Petition are reviewed.

Exhibit A of the Petition also includes a list of signatures from neighbors and members of the community, expressing their support for the current natural beach condition. This community support provides evidence that the public interest favors the granting of a stay, and would not be harmed by it.

B. Substantial Harm to Petitioner

Section VI of the Petition also provides that:

Denial of a stay, on the other hand, will cause significant and unnecessary expenditures as a result of the requirement for the placement of sharp rocks to cover a significant portion of the sandy beach. This activity has been ordered despite the stated intent of Petitioners to later remove those same rocks to restore the community resource when permitted by the RWQCB. Petitioners have offered, on the record of the hearing of these proceedings, to assist in funding the expansion of the sandy beach for the benefit of the neighborhood and the community. There is no rational reason for requiring the rocks be replaced. The balance of equities favors a stay be issued.

The actions required by the CAOs would be expensive to undertake and expensive to undo. The deposit of "riprap" would create an unsafe condition whereby persons seeking bay access may suffer injury when trying to make their way across such large rocks.

C. Substantial Questions of Fact or Law

Finally, Section VI of the Petition provided the following statement.

There are substantial legal questions about the correct interpretation of the term "waste" as that term is used in the California Water Code, and those questions also weigh in favor of granting a stay.

Section V of the Petition provides detailed support for the point that Petitioners did not discharge a "waste" in violation of the Cal. Water Code. This point depends on substantial questions of both law and fact. As the Petition explains, case law and Attorney General Opinions address the scope of the meaning of "waste" under the Cal. Water Code. And these decisions favor an interpretation that Petitioners actions did not qualify as a discharge of "waste." At the very least, substantial questions of law exist concerning the meaning of "waste" and discharge of waste. Substantial questions of fact also exist. As the Petition explains, the RWQCB's CAOs largely depend on factual conclusions that beach sand has eroded from the area in question and that eelgrass has retreated. As the Petition explains, evidence exists to the contrary on both these points. Substantial questions of both law and fact exist.

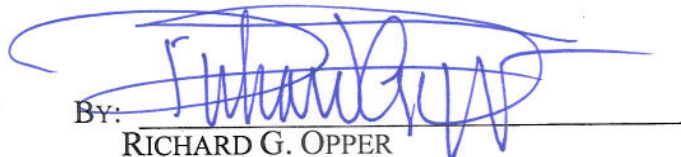
The Petition raises substantial issues that are appropriate for review by the SWRCB. Petitioners appreciate the opportunity to bring this matter before the State Board.

DATE:

July 27, 2007

Respectfully submitted,
OPPER & VARCO, LLP

BY:



RICHARD G. OPFER
ATTORNEYS FOR PETITIONERS
BILL & HEIDI DICKERSON; LARRY &
PENNY GUNNING; AND PERRY &
PAPENHAUSEN, INC.

EXHIBIT 1

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
Summary of Board Actions and Proceedings
at the June 13, 2007 Board Meeting

MINUTES

Minutes of Board Meeting of May 9, 2007.

CONSENT ITEMS

Update of Waste Discharge Requirements:
Oak Tree Ranch, Inc., Oak Tree Ranch
Private Residential Community Wastewater
Treatment and Disposal Facility near
Ramona, San Diego County (tentative Order
No. R9-2007-0046) (*Michelle Mata*)

Waste Discharge Requirements:
Winchester Wesselink LLC, Wesselink
Dairy, Riverside County (tentative Order No.
R9-2007-0042) (*Robert Morris*)

NON-CONSENT ITEMS

Total Maximum Daily Loads for dissolved
Copper, Lead, and Zinc in Chollas Creek,
Tributary to San Diego Bay. The Regional
Board will deliberate and consider adopting
an amendment incorporating the TMDLs in
the Basin Plan (tentative Resolution No. R9-
2007-0043) (*Benjamin Tobler*)

PUBLIC HEARING: The Regional Board
will consider affirming Cleanup and
Abatement Orders for the unauthorized
discharge of fill to San Diego Bay at 501
and 505 First Street, Coronado, San Diego
County: (*Frank Melbourne*)

- A. Addendum No. 2 to Cleanup and
Abatement Order No. R9-2006-0101 to Bill
and Heidi Dickerson, and Perry and
Papenhausen Construction for the
unauthorized discharge of fill to San Diego
Bay in violation of 401 Water Quality
Certification (File No. 05C-041). 501 First
Street, Coronado, San Diego County.
- B. Addendum No. 2 to Cleanup and
Abatement Order No. R9-2006-0102 to
Larry and Penny Gunning, and Perry and
Papenhausen Construction for the
unauthorized discharge of fill to San Diego
Bay. 505 First Street, Coronado, San Diego
County.

REGIONAL BOARD ACTIONS

Approved minutes.

Approved Order No. R9-2007-0046.

Approved Order No. R9-2007-0042.

Adopted Resolution No. R9-2007-0043 with
errata.

Affirmed Addendum No. 2 to Cleanup and
Abatement Order No. R9-2006-0101.

Affirmed Addendum No. 2 to Cleanup and
Abatement Order No. R9-2006-0102.

Summary of Regional Board Actions

June 13, 2007

Page 2

POSTPONED ITEMS

NPDES Permit Reissuance: Frank J. Konyon Dairy – Near Escondido, San Diego County (NPDES No. CA0109053, tentative Order No. R9-2007-0053) (*Whitney Ghoram*)

NPDES Permit Reissuance: Tom Van Tol T.D. Dairy, Near Ramona, San Diego County (NPDES No. CA0109339, tentative Order No. R9-2007-0066) (*Whitney Ghoram*)

PUBLIC HEARING: Continuation of Administrative Review for Water Quality Investigation Order No. R9-2006-0044 issued to the City of San Marcos for the Bradley Park/Old Linda Vista Landfill, San Diego County. A panel of four Regional Board members heard public testimony regarding the investigation Order as ITEM 8 at the Regional Board Meeting on May 9, 2007. The panel of Regional Board members will make a recommendation to the remaining Regional Board members regarding the staff recommendation to affirm Water Quality Investigation Order R9-2006-0044, as amended. (*Amy Grove*)

PUBLIC HEARING: San Diego County Water Authority, San Vicente Pipeline Dewatering Project: Administrative Assessment of Civil Liability containing Mandatory Minimum Penalties for reported violations of effluent limitations prescribed in Order No. 2001-96, NPDES No. CAG919002, General Waste Discharge Requirements for Groundwater Extraction and Similar Waste Discharges from Construction, Remediation, and Permanent Groundwater Extraction Projects to Surface Waters Within the San Diego Region Except for San Diego Bay. (Tentative Order No. R9-2007-0088) (*Rebecca Stewart*)

REGIONAL BOARD ACTIONS

Item postponed.

Item postponed.

Item postponed.

Item postponed.

Summary of Regional Board Actions
June 13, 2007

POSTPONED ITEMS – Continued
PUBLIC HEARING: Terra Vac, Body
Beautiful Car Wash Remediation
Dewatering: Administrative Assessment of
Civil Liability containing Mandatory
Minimum Penalties for reported violations of
effluent limitations prescribed in Order No.
2000-90, NPDES No. CAG919001, General
Waste Discharge Requirements for
Temporary Groundwater Extraction and
Similar Waste Discharges to San Diego Bay
and Storm Drains or Other Conveyance
Systems Tributary Thereto. (Tentative Order
No. R9-2007-0089) (*Rebecca Stewart*)

Reissuance of Waste Discharge
Requirements and NPDES Permit
CAG919001 for discharges from temporary
groundwater extraction and similar waste
discharges to San Diego Bay, tributaries
thereto under tidal influence, and storm
drains or other conveyance systems
tributary thereto. If adopted, Tentative
Order No. R9-2007-0032, would supersede
the current WDR Order No. R9-2000-0090.
(Tentative Order No. R9-2007-0032)
(*Vicente Rodriguez*)

Reissuance of Waste Discharge
Requirements and NPDES Permit
CAG919002 for discharge from
Groundwater Extraction waste to Surface
Waters within the San Diego Region Except
for San Diego Bay. If adopted, Tentative
Order No. R9-2007-0071, would supersede
the current WDR Order No. R9-2001-0096.
(Tentative Order No. R9-2007-0071)
(*Vicente Rodriguez*)

REGIONAL BOARD ACTIONS

Item postponed.

Item postponed.

Item postponed.

EXHIBIT 2

Hi Richard,
The California Regional Water Quality Control Board, San Diego Region has received your petition regarding the Coronado Seawalls.

Frank T. Melbourn, P.E.
Water Resource Control Engineer
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San Diego, CA 92123
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>>> "Richard Opper" <ropp@envirolawyer.com> 7/12/2007 1:55 PM >>>

Pursuant to sections 13320 and 13321 of the California Water Code, attached please find a petition for review and a request to stay the San Diego Regional Water Quality Control Boards action to affirm Cleanup and Abatement Orders R9-2006-0101 & R9-2006-0102. Please confirm your receipt of this petition. Thank you.

Richard G. Opper
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**BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

IN THE MATTER OF:

**CLEANUP AND ABATEMENT ORDERS
NUMBERS R9-2006-0101 & R9-2006-0102**

**PETITION FOR REVIEW OF SAN DIEGO REGIONAL WATER QUALITY
CONTROL ACTION AFFIRMING CLEANUP AND
ABATEMENT ORDERS R9-2006-0101 & R9-2006-0102**

And

REQUEST FOR STAY

JULY 12, 2007

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TABLE OF CONTENTS

| | | |
|-------------|---|-----------|
| I. | INTRODUCTION | 1 |
| II. | REQUEST FOR RESCISSION OF ORDER | 3 |
| III. | FACTUAL BACKGROUND | 3 |
| IV. | SUMMARY OF THE RWQCB'S EVIDENCE..... | 6 |
| V. | ARGUMENT | 9 |
| | A. Petitioners Did Not Discharge Waste | 10 |
| | 1. A “Destabilized” Beach Does Not Qualify as a Waste | 10 |
| | 2. The Retaining Wall Does Not Qualify as a Waste | 12 |
| | B. Petitioners Did Not Cause a Condition of Pollution or Nuisance..... | 14 |
| VI. | REQUEST FOR STAY..... | 16 |
| VII. | CONCLUSION..... | 17 |

I.

INTRODUCTION

On June 13 of 2007, the San Diego Regional Water Quality Control Board ("RWQCB") voted to affirm Cleanup and Abatement Orders R9-2006-0101 and R9-2006-0102 ("CAOs"). Pursuant to Cal. Water Code § 13320, this timely petition asks the State Water Resources Control Board ("SWRCB") to review the RWQCB's action.

The RWQCB issued the CAOs to three parties ("Petitioners"): 1) Bill & Heidi Dickerson¹ (CAO R9-2006-0101); 2) Larry and Penny Gunning² (CAO R9-2006-0102); 3) and Perry and Papenhausen, Inc.³ – named on both CAOs.

The CAOs address the natural shoreline condition that Petitioners restored on approximately one hundred and sixty (160) feet of the San Diego Bay shoreline, adjacent to their homes in Coronado, by removing "riprap" comprised of rock and discarded chunks of asphalt roads. Their efforts revealed natural beach conditions which had been previously concealed by the "riprap." The CAOs characterized the natural beach condition as a "destabilized beach" and, in turn, found that shifting sands on the "destabilized beach" violate the California Water Code by discharging into the San Diego Bay. The CAOs demand that the Petitioners import rock "riprap" and cover much of the beach area with such "riprap" in order to "stabilize" the beach and recreate the debris-strewn condition that existed prior to the Petitioners' efforts.

Rather than place tons of rock, Petitioners would like to maintain the restored

¹ 501 First Street Street, Coronado, California 92118.

² 501 First Street Street, Coronado, California 92118.

³ 9748 Los Coches Rd Ste 3, Lakeside California 92940.

natural beach condition. In more detail, below, this petition sets forth the reasons why the RWQCB's action was improper. In summary, the RWQCB: 1) incorrectly and without substantial evidence concluded that the Petitioners' actions discharged waste to waters of the state; 2) incorrectly and without substantial evidence found that Petitioners created a condition of nuisance or pollution; and 3) improperly issued cleanup and abatement demands in reliance on such incorrect findings.

Because of the RWQCB's improper action, Petitioners would be substantially aggrieved. Petitioners would be required to place thousands of pounds of rock fill, or "rip rap," on the shore of the San Diego Bay and could be ordered to remove a retaining wall on their private property or perform efforts to justify to the RWQCB that such removal is not necessary.

The issues raised in this petition were raised before the RWQCB during oral presentations at a RWQCB hearing held on June 13, 2007, and in written correspondence delivered to the RWQCB. Furthermore, this petition was delivered to the RWQCB contemporaneously with service upon the SWRCB. Finally, the following discussion provides additional details as well as points and authorities in support of legal issues raised in the petition.

II.

REQUEST FOR RESCISSION OF ORDER

Petitioners request the SWRCB to find that the RWQCB improperly affirmed the CAOs, and to rescind the CAOs. More specifically, Petitioners request that the SWRCB find:

- 1) Petitioners' retaining wall does not qualify as a "waste" nor a "discharge of waste" under the meanings given to those terms by the California Water Code.
- 2) Natural sand adjacent to Petitioners' retaining wall does not qualify as a "waste" nor a "discharge of waste" under the meanings given to those terms by the California Water Code.
- 3) Petitioners have not caused a "condition of pollution or nuisance" under the meanings given to those terms by the California Water Code.

III.

FACTUAL BACKGROUND

On May 18, 2007, Petitioners submitted a Response to Request for Required Technical Report No. R9-2007-0078 ("RTR Report") to the RWQCB. That submittal, along with its forwarding letter, detailed the events which have resulted in the current natural condition of the bayshore near 501 and 505 First Street in Coronado, California. The RWQCB CAOs (Ex. B) and the RWQCB Technical Analyses on the CAOs also summarized the factual background.

In summary, on or around February of 2006, the Petitioners removed discarded rock, concrete, asphalt road chunks, and other debris from the bayshore adjacent to 501 and 505 First Street in Coronado, California - returning the bayshore to its natural

condition. In April of 2006, the Property Owners constructed a mortarless block retaining wall on their private property. To do this, the Petitioners excavated a trench – taking care to pile excavated material landward of the wall – poured a concrete footer and, in turn, constructed an approximate four foot high mortarless block retaining wall. The wall lies on the Petitioners' private property. The San Diego Unified Port District ("Port") has claimed that the "toe" of the wall (though not the wall itself) extends inches into tidelands within the Port's jurisdiction.

According to the San Diego Regional Standards Committee, the "mean high water" mark of the San Diego Bay lies at 4.89 feet above the "mean lower low water" datum. According to a professional survey performed by Algert Engineering and provided to the RWQCB, this "mean high water" boundary lies approximately ten feet seaward of the Petitioners' mortarless wall. The "highest tide," according to the San Diego Regional Standards Committee, lies at 7.79 feet above the "mean lower low water" datum. According to Algert Engineering's survey, the retaining wall lies just at this "highest tide" boundary and the toe of the wall extends inches seaward of it.

Though it is not an issue that Petitioners bring before the SWRCB (nor did Petitioners bring it before the RWQCB), uncertainty exists over the boundary of the Port's jurisdiction. Based on information known to them, Petitioners possess a good faith belief that the Port's jurisdiction ends and, in turn, that the Petitioners property begins at the mean high tide level (approximately ten feet seaward of the retaining wall) and not at the "highest tide" level. Thus, Petitioners believe that the footer of the wall does not extend

into the Port's jurisdiction. In separate negotiations with the Port, the Petitioners intend to precisely identify the proper boundary between the Port's and Petitioners' property.

In the ten months following the removal of "riprap" and the construction of the retaining wall, the Petitioner's biologist, Dr. Jean Nichols, observed no effect to eelgrass in the San Diego Bay near the Petitioners' properties. During this entire period, the beach was an alleged "destabilized" beach, but no effects on eel grass habitat were recorded. In the fall of 2006, Dr. Nichols measured the eelgrass boundaries every month, and continued to record no change to eelgrass. However, in the winter of 2007 Dr. Nichols observed and measured an eelgrass retreat in the vicinity of Petitioners' homes, which Dr. Nichols attributed to normal seasonal fluctuations. In May of 2007, Dr. Nichols measured and recorded that the eelgrass had begun to rebound and in some areas has nearly fully rebounded from the winter retreat. In the course of closely inspecting eelgrass near the Petitioners' property, Dr. Nichols also observed apparent affects to eelgrass caused by storm water discharge located immediately adjacent to Petitioners' property.

In April of 2006 the RWQCB issued the CAOs to which the Petitioners objected within thirty days (and requested a hearing) on the grounds that it contained factual errors. The CAOs, among other things, incorrectly suggested that the Petitioners imported sand to the bayshore. Attachment 1 to the original CAOs characterized the natural beach as a "new imported sand beach." Such characterization remains in the now-amended CAO's

attachment, even though the amended CAOs otherwise remove references to imported sand.

On May 10, 2007, the RWQCB issued Addendum 2 to the CAOs. Addendum 2 does not assert that the Petitioners imported sand. Rather, it is largely based on the finding that "destabilized" beach conditions adversely impact eelgrass. Petitioners requested a timely hearing on the Addendums. On June 17 of 2007, the RWQCB held a hearing at which RWQCB staff summarized their findings. The RWQCB affirmed the CAOs. This petition follows.

IV.

SUMMARY OF THE RWQCB'S EVIDENCE

The RWQCB CAOs demand that the Petitioners immediately place "riprap" on the shoreline and, in turn (before May 1, 2008), that Petitioners remove the retaining wall to restore the shoreline to its "pre-project" condition. The RWQCB justifies these orders in "findings" documented within the CAOs (Ex. B), within the Technical Analysis for the CAOs, and within the presentation materials that RWQCB staff delivered during the June 13, 2007 RWQCB hearing.

The RWQCB's findings focus on two main points. First, that the Petitioners discharged waste into waters of the state. Second, that such waste discharges create a condition of pollution of nuisance. The following list summarizes the RWQCBs findings and evidence.

Waste Discharge "Findings"

- 1) "The construction of the seawall and concrete footing is a discharge of *waste* to waters of the U.S./State in violation CWC [sic] Section 13260." (CAOs, emphasis added.)
- 2) "The discharge or deposit of sand, soil and sediment into water of the state constitute *waste* as defined in California Water Code section 13304." (CAOs, emphasis added.)
- 3) The pouring of concrete footing on Port District tidelands is a discharge of *waste* into waters of the state. (Technical Analyses.)
- 4) Petitioners "destabilized the beach resulting in a continuing discharge of *waste* to waters of the state." (CAOs, emphasis added.)
- 5) Petitioners "have discharged *waste* (concrete, sand, soil, and sediment) into waters of the state ... in violation of a Regional Board Order." (Technical Analyses, emphasis added.)
- 6) Petitioners violated Waste Discharge Prohibition No. 7 of the RWQCB Plan by the "dumping, deposition, or discharge of *waste* directly into waters of the state, or adjacent to such waters in any manner which may permit it being transported into the waters" (Technical Analyses, emphasis added.)

"Findings" That Discharge Caused Pollution or Nuisance

- 7) Petitioners violated the Basin Plan prohibitions by discharging "*waste* to the waters of the State in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance" (CAOs, emphasis added.)
- 8) "[Petitioners] have created a condition of pollution by unreasonably affecting the waters for Marine Habitat." (Technical Analyses.)
- 9) "The [Petitioners] ... have discharged *waste* and created a condition where *waste* continues to be discharged into waters of the U.S./State where it has caused and/or threatens to cause a condition of pollution or nuisance by increasing the levels of sediment, and settleable and suspended material." (CAOs, emphasis added.)

- 10) "The unauthorized discharge of fill⁴ and exposure of a sandy beach causes and threatens to cause a condition of pollution by directly affecting waters used for beneficial uses." (CAOs.)

Evidence

To support these findings, RWQCB provides the following evidence:

- 1) A photograph dated "April/May 2006" showing the natural beach, the exposed footer to the Petitioners' retaining wall, and small amounts of sand piled against some areas of the footer. (June 13, 2007 Hearing Materials.)
- 2) A photograph dated May 11, 2006, also showing the natural beach, the exposed footer and the retaining wall, and a small pile of sand in front of an approximate ten foot portion of the retaining wall. (June 13, 2007 Hearing Materials.)
- 3) An aerial photograph dated "May 2006" showing the line of eelgrass in front of Petitioners' property and along the beach for approximately three blocks in each direction. (June 13, 2007 Hearing Materials.)
- 4) A photograph, dated June 12, 2006, which shows the natural beach and the retaining wall's footer covered entirely by beach sand and not visible. (June 13, 2007 Hearing Materials.)
- 5) A photograph dated September 14, 2006 which shows the again-exposed footer of the retaining wall, the wall, and the natural beach. (June 13, 2007 Hearing Materials.)
- 6) Photographs taken on October 09 and December 04 of 2006, showing that waters of the San Diego Bay contacted the Petitioners retaining wall. (June 13, 2007 Hearing Materials.)
- 7) A ground-level photograph, dated June 4, 2007, which shows the natural beach, and eelgrass in front of a portion of the Petitioners' property and adjacent to their property in one direction. (June 13, 2007 Hearing Materials.)

⁴ With the exception of this single mention of "fill," every finding within the CAOs, all discussion within the Technical Analyses to the CAOs, and the RWQCBs presentation on June 13, 2007 assert "waste" discharges. This sole provision mentioning "fill" amended an earlier provision which incorrectly contemplated the import of sand "fill" and "creation" of a sandy beach. Addendum 2 deleted "creation" and replaced it with "exposure," in recognition that no sand "fill" effort occurred. Thus, even though this provision mentions "fill," the RWQCB findings only address "waste." In turn, the CAOs were not based on a finding of a discharge of fill.

- 8) An elevation survey of the bay sands adjacent to the Petitioners' property showing fall and winter beach sand profiles which differ slightly. (Technical Analyses.)
- 9) Based on these photos, an opinion by Mr. Frank Melbourne, a Water Resource Control Engineer at the RWQCB, that "[d]estabilization of the beach resulted in the mobilization of the beach sands that smothered large portions of the eelgrass beds in front of 501 and 505 First Street." (Technical Analyses.) Also based on these photos, an additional opinion by Mr. Melbourne that "[s]ince the riprap was removed, the eelgrass beds have receded from the shoreline." (Technical Analyses.)

V.

ARGUMENT

The substantial evidence standard applies to Regional Board and State Board proceedings. (*Aluminum Company of America*, Order No. WQ 93-9; *Sanmina Corporation*, Order No. WQ 93-14.) The substantial evidence standard requires that "the agency which renders the challenged decision must set forth findings to bridge the analytical gap between the raw evidence and ultimate decision or order." (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 507, 515.) Substantial evidence "means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (*Dore v. County of Ventura* (1994) 23 Cal.App.4th 320, 327-330.)

The RWQCB made incorrect analytical leaps and therefore drew incorrect conclusions. First, while the RWQCB accurately understands the series of events undertaken by Petitioners, the RWQCB incorrectly leaps to the conclusion that a

discharge of waste occurred. Even if a discharge of waste did occur, this discharge did not create a condition of nuisance or pollution. Substantial evidence does not support the RWQCB's finding that the Petitioners caused an adverse impact to eelgrass.

A. Petitioners Did Not Discharge Waste.

Cal. Water Code § 13304 authorizes the RWQCB to issue a cleanup order to “[a]ny person ...who has caused or ... causes ... any *waste* to be discharged or deposited where it is, or probably will be, discharged to waters of the state **and creates, or threatens to create, a condition of pollution or nuisance.**” (Cal. Water Code § 13304(a), emphasis added.) Thus, as a threshold matter, in order to justify the issuance of an Order, a discharge of *waste* must exist. Cal. Water Code § 13050(d) defines “waste” as follows: “Waste includes sewage and any and all waste substances [including solids] ... associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation of whatever nature.” (Cal. Water Code § 13050(d).)

1. A "Destabilized" Beach Does Not Qualify as a Waste

The RWQCB found that a "destabilized beach" qualifies as a discharge of waste. No substantial evidence supports this finding. RWQCB staff offered photos which showed bay sands covering the "toe" of the retaining wall, and photos where the "toe" lied exposed. During the June 13, 2007 hearing, RWQCB staff concluded that the exposed "toe" photos evidenced rapid erosion of sand. RWQCB staff apparently failed to notice

(or note to the Board) that the photos showed the "toe" exposed months before photos showed it covered by sand. Thus, the exposure and covering of the "toe" evidences sand profile fluctuations, not erosion.

In its Technical Analyses for the CAOs, the RWQCB also measured the bay sand profile adjacent to 501 and 505 First Street (but not at the neighboring properties) during two time periods – October 2006 and January 2007. The Technical Analyses depicts a winter profile (January 2007) which differs slightly from the fall profile (October 2006). From this, the RWQCB concluded that erosion occurred. While the Technical Analyses may accurately measure the sand profile (though Petitioners do not admit this), the Technical Analyses does not provide evidence or otherwise support a finding that the Petitioners caused the apparent slight difference in the sand profile. Rather, the apparent sand profile differences exist because of natural, seasonal shifting of sands.

Even if some bay shore sands have eroded, such hypothetical erosion would not qualify as a discharge of waste. The California Court of Appeal directly ruled on whether natural sediments or soils qualify as waste. In the matter of *Lake Madrone Water District v. State Water Resources Control* (1989) 209 Cal. App.3d, 163, 169-170, a man-made dam concentrated naturally flowing sediments which discharged the artificially concentrated sediments through a gate valve, causing over a foot of sediment to settle downstream from the valve. (*Id.* at 170, n. 2.) The court held that the dam, a product of human habitation, was a “producer of waste.” (*Id.* at 170.) Here, quite the opposite scenario has occurred. The shoreline now lies restored to its natural state, where natural

sands interact with the bay in a way unaffected by human habitation. No producer of waste exists.

The Petitioners' removed human habitation influences (the "riprap"). Now, the condition of natural sand matches the conditions that have existed historically. Such natural conditions can hardly qualify as ones associated with human habitation. The only conceivable claim of human habitation influences would exist if the Petitioners' retaining wall affected the movement of bay sands. In a report provided to the RWQCB, Mr. David Skelly (a professional coastal engineer) concluded that the retaining wall does not alter the manner in which bay sands might move. In any event, the RWQCB provided no findings or evidence that the retaining wall impacts the natural movement of sand along the bay.

Petitioners restored the bay to its natural state. The natural sands along the shores of the San Diego Bay do not qualify as a "waste" nor does their movement or shifting qualify as a "discharge of waste."

2. The Retaining Wall Does Not Qualify as a Waste

Petitioners' retaining wall does not qualify as a waste. The meaning of waste is confined to "waste substances." (Cal. Water Code § 13050(d).) While judicial and SWRCB administrative decisions address discarded soils as waste, no authority holds that an operating retaining wall qualifies as a waste. Indeed, the lack of such a rule squares with a 1950 California Attorney General opinion. There, when considering whether

discarded construction materials qualified as waste, the Attorney General concluded that waste means "[s]omething rejected as worthless or not needed; surplus or useless stuff." (16 *Ops. Cal. Atty. Gen.* 125, 131 (1950) .) Here, the retaining wall hardly qualifies as rejected, worthless, or surplus stuff. The retaining wall is not a waste.

Even if the wall did qualify as a waste (which it does not), it does not lie in the waters of state. Waters of the state end at the mean high tide line, however that line moves with time. (*Marks v. Whitney* (1971) 6 Cal. 3d 251, 257-258 (tidelands lie between the lines of mean high and mean low tide); *Lucheza Villas West v. California Coastal Commission* (1997), 60 Cal. App.4th 218, 235 (mean high tide line moves and thus tideland legal boundaries also move).) According to the San Diego Regional Standards Drawing M-12, the mean high tide mark lies at 4.89 feet above the "mean lower low tide" datum and: approximately ten feet seaward of Petitioners' retaining wall.

Furthermore, the permanent "deposit" of the wall approximately ten feet from the waters of the state (even if it were a waste) makes it impossible to discharge into the waters of the state. The only conceivable way that the wall's "deposit" would discharge to waters of the state could occur during extraordinary high tides where water touches the wall. For such an event to qualify as a discharge, "waste" materials from the wall must somehow transfer from the wall into the bay water. Given the inert nature of mortarless block, this seems highly unlikely. But in any event, the RWQCB made no findings and presented no evidence that retaining wall "waste" materials transfer into the bay waters.

B. Petitioners Did Not Cause a Condition of Pollution or Nuisance.

Even assuming that a waste discharge exists (which it does not), the RWQCB may only issue CAOs if such a discharge causes or threatens to cause a condition of pollution or nuisance. (See Cal. Water Code § 13304(a).) Again, leaping to improper conclusions in their Technical Analyses, the RWQCB claims that it may issue CAOs even where discharges do not cause or threaten to cause a condition of pollution or nuisance. This conclusion conflicts with a plain reading of the Water Code and would allow regional boards to issue CAOs even where no condition of pollution or nuisance existed.

Indeed, the pollution or nuisance requirement dates back to at least 1956, when a California Attorney General opinion explained that regional boards may only act when a waste discharge exists *and* where the discharge causes a condition of pollution or nuisance. (27 Ops. Cal. Atty. Gen. 182, 183 (1956)). The RWQCB may only issue CAOs if a waste discharge causes or threatens to cause a condition of pollution or nuisance.

In the CAOs, the RWQCB found that shoreline erosion threatens to degrade eelgrass and, therefore, that a condition of pollution exists. This finding presupposes that shoreline erosion qualifies as a discharge of waste, which it does not. But even assuming that it does, no evidence exists that eroding or shifting sands has caused adverse effect to eelgrass beds.

During the RWQCB's hearing, Jean Nichols, Ph.D., a professional biologist, explained the following. Dr. Nichols has observed eelgrass since the time when (and before) the Petitioners restored the shore to its natural state. During the months after the Petitioners created the alleged "destabilized" beach, Dr. Nichols observed no impact to eelgrass. In the summer of 2006, Dr. Nichols observed no impact to eelgrass. In the fall of 2006, from September of 2006 to December 2006, Dr. Nichols similarly observed no eelgrass retreat. In January through March of 2007 (nine months after Petitioners restored the beach), Dr. Nichols observed the retreat of eelgrass beds near 501 and 505 First Street, as well as along the entire bayshore. Dr. Nichols attributes this to the normal cycle of eelgrass retreat during the winter when requisite light and warmth are lacking.

More recently, in May and June of 2007, Dr. Nichols has observed the return of eelgrass beds to levels approaching those that existed before the winter. Though eelgrass has not fully returned, Dr. Nichols expects that during the course of the summer eelgrass beds will return to their September 2006 level. In the course of closely inspecting eelgrass near the Petitioners' property, Dr. Nichols also observed apparent affects to eelgrass caused by storm water discharge seaward of a public park, located immediately adjacent to Petitioners' property. Such storm water discharges may impact eelgrass beds in the areas adjacent to Petitioners' property. (See Ex. C, showing eelgrass impact in vicinity.)

During the June 13, 2007 RWQCB hearing, the only expert professional testimony introduced concerning the eelgrass beds was that of Dr. Nichols, who opined that no

activity related to beach sands was having any impact on the beds that was either noticeable or measurable. Contrary opinions were offered by RWQCB staff professionals who were not biologists, but more significantly had no quantitative data to support their assertion that the eelgrass beds were in some way impacted by the sands on the beach.

The RWQCB's non-expert, qualitative leaps to conclusions do not qualify as substantial evidence. No substantial evidence exists that Petitioners have caused or threaten to cause adverse impacts to eelgrass.

VI.

REQUEST FOR STAY

Petitioners request that they be granted a stay from compliance with the terms of the CAO while this matter is considered by the SWRCB. Significant questions of law and fact are presented by this Petition, and both legal and equitable reasons support maintaining the *status quo ante* while these issues are analyzed. A stay would not impact any impairment of the quality of the waters of the state, as no such impairments are occurring. As illustrated and described in the Declaration of Counsel in Support of a Petition for Stay, (attached hereto as Exhibit A) a stay would allow the public, which uses and supports the existence of the sandy beach, continued access to this community resource while the issues presented by this Petition are reviewed.

Denial of a stay, on the other hand, will cause significant and unnecessary expenditures as a result of the requirement for the placement of sharp rocks to cover a

significant portion of the sandy beach. This activity has been ordered despite the stated intent of Petitioners to later remove those same rocks to restore the community resource when permitted by the RWQCB. Petitioners have offered, on the record of the hearing of these proceedings, to assist in funding the expansion of the sandy beach for the benefit of the neighborhood and the community. There is no rational reason for requiring the rocks be replaced. The balance of equities favors a stay be issued. In addition, there are substantial legal questions about the correct interpretation of the term "waste" as that term is used in the California Water Code, and those questions also weigh in favor of granting a stay.

VII.

CONCLUSION

The RWQCB may only issue CAOs to persons who discharge waste which causes or threatens to cause a condition of pollution or nuisance. Neither the Petitioners' retaining wall nor the alleged "destabilized" natural sand qualify as a "waste." Nor do they discharge into waters of the state. The Petitioners have not and do not violate the California Water Code. The Petitioners have not caused nor do they threaten to cause a condition of pollution or nuisance. While the RWQCB alleges that eelgrass impacts qualify as a condition of pollution, the RWQCB does not set forth substantial evidence to support this conclusion. Even if eelgrass impacts do exist, the RWQCB does not set forth substantial evidence to show that Petitioners caused such alleged eelgrass impacts.

Petitioner ask the SWRCB to find that the RWQCB improperly affirmed the CAOs issued to Petitioners, and request that the SWRCB rescind the CAOs. More specifically, the SWRCB should find:

- 1) Petitioners' retaining wall does not qualify as a "waste" nor a "discharge of waste" under the California Water Code.
- 2) Natural sand adjacent to Petitioners' retaining wall does not qualify as a "waste" nor a "discharge of waste" under the California Water Code.
- 3) Petitioners have not caused a "condition of pollution or nuisance" under the California Water Code.

DATE:

7/12/07

Respectfully submitted,

OPPER & VARCO, LLP

BY:



RICHARD G. OPPE
ATTORNEYS FOR PETITIONERS
BILL & HEIDI DICKERSON; LARRY &
PENNY GUNNING; AND PERRY &
PAPENHAUSEN, INC.

Exhibit A

1 **OPPER & VARCO, LLP**
RICHARD G. OPFER (Bar No. 72163)
2 LINDA C. BERESFORD (Bar No. 199145)
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4 Attorneys for Petitioners; William and Heidi
Dickerson, Larry and Penny Gunning, and Fred
5 Perry dba Perry & Papenhaus Construction

6 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

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14 In Re: Cleanup and Abatement Orders
Numbers R9-2006-0101 & R9-2006-0102

DECLARATION OF RICHARD G.
OPPER IN SUPPORT OF PETITION
FOR STAY

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17 AFFIRMED BY THE SAN DIEGO REGIONAL
WATER QUALITY CONTROL BOARD ON JUNE
18 13, 2007
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23 I, Richard G. Oppper, hereby declare as follows:

24 1. I am counsel of record for Petitioners: William and Heidi Dickerson, Larry
25 and Penny Gunning and Fred Perry dba Perry & Papenhaus Construction Co., Inc.

26 2. On June 13, 2007, Petitioners appeared before the San Diego Regional
27 Water Quality Control Board ("RWQCB") and requested that the Clean Up and
28 Abatement Orders R9-2006-0101 and R9-2006-0102 ("CAOs") which had issued naming

1 them as “dischargers” be rescinded on a variety of bases, including that no waste had
2 been discharged, no condition of pollution or nuisance had been created, and that the
3 existence of the sandy beach was not deleterious to the nearby eelgrass beds. At this
4 hearing, it was clear that the key nexus between the CAOs and the actions of Petitioners
5 was related to allegations about the eelgrass beds and their condition. The only expert
6 professional testimony introduced concerning the eelgrass beds was that of Jean Nichols,
7 Ph.D, a professional biologist, who opined that no activity related to beach sands was
8 having any impact on the beds that was either noticeable or measurable. Contrary
9 opinions were offered by RWQCB staff professionals who did not represent that they
10 possessed advanced degrees in biology, and had no quantitative data to support their
11 assertion that the eelgrass beds were in some way impacted by the sands on the beach.

12 3. At the time of the hearing, Petitioners requested that if not rescinded, the
13 hearing to affirm the CAOs be continued for some limited period so that continued
14 monitoring of the eelgrass beds, which provided quantitative support for Dr. Nichol’s
15 professional opinions, could be recorded and observed to illustrate that no adverse
16 impacts had occurred to the beds as a result of any alleged “destabilized beach
17 conditions.”

18 4. The staff of the Regional Board resisted Petitioners request, and, despite the
19 absence of support in the record of proceedings, on June 13, 2007, the Regional Board
20 voted to affirm the Cleanup and Abatement Orders which required covering the restored
21 beach with riprap by July 2, 2007. As of this date, the Army Corps of Engineers has not
22 issued the permits necessary for this activity to take place, and no riprap has been
23 installed to date, nor can it be given the lack of appropriate permit authority. Staff of the
24 Regional Board has indicated its intention to adjust the implementation dates of the
25 CAOs as a result of the tardy issuance of permits.

26 5. Petitioners requested that a process be engaged to allow the restored natural
27 beach conditions to remain, but the Regional Board will not consider review of such a
28 process until after riprap again covers the sandy beach.

1 6. The sandy beach is currently being used by community members and
2 families, and a recent circulation of petitions to maintain the beach illustrated that
3 neighbors and visitors favor retaining it. Attached to this declaration are true and correct
4 copies of signed petitions to that effect.

5 7. Riprap is a danger to the families and children that play along the coast,
6 and, in particular, visitors to the Bay View Park built and maintained by the City of
7 Coronado that lies immediately adjacent to the sandy beach, which has been named by
8 the local community "Bay View Beach." In addition to being unsightly and dangerous,
9 the riprap provides a home to rats and other disease carrying vectors. I am informed and
10 believe that the City of Coronado is alleged to have a practice of trapping rats elsewhere
11 in the City's jurisdiction and releasing them into the riprap surrounding the coastline.

12 8. Covering the beach with riprap will cause Petitioners to expend tens of
13 thousands of dollars, which, if restoring the beach to its natural sandy condition is later
14 approved, will pale beside the cost of again removing the rocks later. These expenditures
15 are neither necessary nor beneficial to the environment.

16 9. Granting a stay will accomplish several useful and equitable things. First, it
17 will allow science to demonstrate that, in fact, there are no adverse impacts to eelgrass as
18 a result of the restoration of the sandy beach. Second, it will avoid the unnecessary
19 expenditure of significant capital that is required for no apparent beneficial purpose.
20 Third, it will allow the public continued access to and use of this public resource during
21 the time the beach is examined and monitored, and avoid exposing the public to the need
22 to climb over sharp rocks as they take advantage of the new community beach. Fourth, it
23 will preserve the status quo while important and unsettled questions of law with regard to
24 the nature of waste and pollution and the proper extent of the state's tidelands are
25 considered by the Board.

26 10. If a stay is not granted the public loses its current access to and use of the
27 beach under safe conditions, the Petitioners will be forced to spend significant capital for
28 reasons that do not impact the quality of the state's waters, and Petitioner's ability to

1 illustrate conclusively that the sandy beach has no adverse impacts to the eelgrass beds
2 may be lost, as the cause of the current resurgence of the beds will then be subject to
3 dispute.

4 I declare, subject to penalty of perjury under the laws of the state of California,
5 that the foregoing is true and correct.

6 Executed this 12th day of July 2007, at San Diego, California.

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Richard G. Opper

Exhibit B

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

**CLEANUP AND ABATEMENT ORDER NO. R9-2006-0101
AS AMENDED BY ADDENDUM NOS. 1 AND 2**

FOR

**BILL & HEIDI DICKERSON
AND
PERRY & PAPENHAUSEN, INC. (AKA PERRY & PAPENHAUSEN
CONSTRUCTION)**

The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board), finds that:

1. On August 23, 2006, the Regional Board Executive Officer issued Cleanup and Abatement Order (CAO) No. R9-2006-0101 to Bill and Heidi Dickerson, and Perry and Papenhausen Construction (hereafter Dischargers) for unauthorized discharge of fill to the San Diego Bay.
2. On October 13, 2006, the Regional Board Executive Officer issued Addendum No. 1 to CAO R9-2006-0101.
3. This second addendum to CAO No. R9-2006-0101 (hereafter Order) has been prepared to address the continued discharge of unauthorized fill into the San Diego Bay that has resulted from violations of the Regional Board's Clean Water Act Section 401 Water Quality Certification (File No. 05C-041) for the removal and replacement of riprap at 501 First Street in the City of Coronado, and the construction of an unauthorized seawall at the same address. This Order supersedes and amends all previously issued versions of CAO No. R9-2006-0101.
4. This Cleanup and Abatement Order is based on: (1) Chapter 5, Enforcement and Implementation commencing with Section 13300, of the Porter-Cologne Water Quality Control Act (Water Code) (Division 7 of the Water Code, commencing with Section 13000); (2) Water Code Section 13267, Investigations and Inspections, Chapter 4, Regional Water Quality Control; (3) all applicable provisions of the *Water Quality Control Plan for the San Diego Basin* (Basin Plan) adopted by the Regional Board including beneficial uses, water quality objectives, and implementation plans; (4) State Water Board Resolution No. 68-16 (*Statement of Policy with Respect to Maintaining High Quality of Waters in California*); (5) State Water Board Resolution No. 92-49 (*Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304*); and all other applicable legal authority.

5. Bill and Heidi Dickerson are the owners of the property at 501 First Street, Coronado, San Diego County (Assessors Parcel Number 536-030-0100).
6. Perry & Papenhausen Construction, Contractor License No. 830775, is the construction firm hired by the Bill and Heidi Dickerson to construct a residence and perform riprap replacement at the shore side of the property at 501 First Street, in the City of Coronado, San Diego County.
7. On July 28, 2005, the Regional Board issued Section 401 Water Quality Certification (File No. 05C-041) and a Waiver of Waste Discharge Requirements (WDR) for Discharge of Dredged and/or Fill Materials to the *Dischargers* for proposed discharges of fill associated with the riprap removal and replacement at their residence located at 501 First Street, in the City of Coronado. The project, as certified by the Regional Board, was to replace approximately 450 cubic yards of existing riprap with approximately 404 cubic yards of engineered riprap within the existing riprap footprint. The new riprap was to be placed between +1 ft. and +4 ft. Mean Lower Low Water (MLLW) over approximately 80 linear feet of shoreline. A filter fabric liner was to be installed beneath the riprap.
8. The San Diego Unified Port District (The Port) has jurisdiction over tidelands below the Mean High Tide Line (MHTL) in San Diego Bay, including those directly adjacent to the property at 501 First Street. The State Legislature has conveyed to the Port the authority to act as trustee for the administration and protection of these tidelands in San Diego Bay.
9. The 401 certification issued for the proposed project authorized permanent impacts to waters of the U.S., limited to 0.01 acre of previously impacted bay waters and 80 linear feet of previously impacted shoreline.
10. Designated existing beneficial uses of coastal waters for San Diego Bay in the Water Quality Control Plan for the San Diego Basin (Basin Plan) include, Industrial Service Supply (IND), Navigation (NAV), Contact Water Recreation (REC 1), Non-contact Water Recreation (REC 2), Commercial and Sport Fishing (COMM), Preservation of Biological Habitats of Special Significance (BIOL), Estuarine Habitat (EST), Wildlife Habitat (WILD), Rare, Threatened or Endangered Species (RARE), Marine Habitat (MAR), Migration of Aquatic Organisms (MIGR) and Shellfish Harvesting (SHELL).
11. On or about May 1, 2006, Dischargers began removal of the existing riprap on the shoreline fronting 501 First Street using an excavator.
12. On or about May 8, 2006, Dischargers excavated soils, natural sand and debris about 48 inches wide and along the entire length of the northern property line for 501 First Street to accommodate the forms for the footing associated with the construction of an unauthorized seawall.

13. On or about May 15, 2006, the *Dischargers* initiated construction of a 4 - 5 ft. high stacked, mortarless, concrete block wall (seawall), and a poured concrete footing directly adjacent to the seawall within waters of the U.S./State.
14. On May 22, 2006, a Port of San Diego survey crew determined that the 162 foot seawall's north edge roughly follows the Mean High Tide Line (MHTL) for its entire length. The Port survey also found that the poured concrete footing encroaches onto Port of San Diego property by approximately 1 foot for the entire length of the footing. Attachment No. 1, is a diagram depicting the results of the Port of San Diego survey of the site.
15. On June 12, 2006, a compliance inspection was conducted by Regional Board Staff. The inspection found that Dischargers had not replaced riprap in accordance with Condition A.1 of the 401 Certification issued by the Regional Board, that riprap removal had also been conducted on the bayside of 505 First Street and that an unauthorized seawall had been constructed along the property line of 501 and 505 First Street. The construction of the seawall and concrete footing and failure to replace riprap created an area of unstabilized sandy beach in San Diego Bay between approximately +2.0 ft. and +7.0 ft. MLLW.
16. On September 27, 2006, the San Diego Unified Port District (Port District) revoked the California Environmental Quality Act (CEQA) categorical exemption for the project, finding that, as constructed, the project differed substantially from the project as originally described. The original project as proposed in the 401 Certification application and the Environmental Assessment prepared for the project was to replace approximately 450 cubic yards of existing riprap with 404 cubic yards of engineered riprap within the existing riprap footprint on the shoreline of San Diego Bay. Instead, the Dischargers removed the existing riprap that was protecting the shoreline from erosion and initiated construction of a four to five foot high stacked, mortarless, concrete seawall and a poured concrete footing with waters of the U.S./State. The Port District determined that the project as completed does not meet the requirements for a Categorical Exemption to CEQA as replacement or reconstruction.
17. On September 23, 2006, the Regional Board withdrew the 401 Certification (File No. 05C-041) issued for the project. The Regional Board withdrew the 401 Certification due to the fact that there was no longer a valid CEQA Document to rely upon, because of the unauthorized deviation from the original project description.
18. Section 13304(a) of the California Water Code provides that:

Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement

or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary efforts. A cleanup and abatement order issued by the state board or a regional board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

19. Clean Water Act (CWA) section 404 requires any person proposing to discharge dredge or fill material into navigable waters of the United States to obtain a Section 404 permit prior to such discharge. Section 401 of the CWA requires that any person obtaining a section 404 permit, obtain water quality certification from the State in which the discharge occurs. Section 13376 of the CWC requires that any person who is proposing to discharge pollutants or dredged or fill material into water of the state to submit a report of waste discharge pursuant to CWC section 13260 prior to such discharge. The Dischargers failed to obtain a section 404 permit and section 401 certification, and failed to file a Report of Waste Discharge for the dredge and fill activities associated with the construction of the seawall. Furthermore, Dischargers unauthorized activities are in violation of Basin Plan Prohibitions.
20. Condition A.1. of the 401 Certification issued for the riprap replacement project required the Dischargers to:

"...at all times, fully comply with the engineering plans, specifications and technical reports submitted with this application for 401 Water Quality Certification and all subsequent submittals required as part of this certification."

The plans and specifications submitted with the application for 401 Certification called for riprap replacement "in conformance with Port of San Diego design criteria" and did not include the construction of a seawall or concrete footing. Dischargers' failure to replace riprap and the construction of a seawall and

footing are in violation of Condition A.1. of the 401 Certification issued by the Regional Board.

21. Eelgrass (Zostera Marina) beds occur in shallow water directly adjacent to the sandy beach created by the project. Eelgrass vegetated areas are recognized as important ecological communities in shallow bays and estuaries because of their multiple biological and physical values. Eelgrass habitat functions as an important structural environment for resident bay and estuarine species, offering both predation refuge and a food source. Eelgrass functions as a nursery area for many commercially and recreationally important finfish and shellfish species that are resident within bays and estuaries, as well as oceanic species that enter estuaries to breed or spawn. Eelgrass is a major food source in near shore marine systems, contributing to the system at multiple trophic levels. In addition to the habitat and resource value of Eelgrass, it serves beneficial physical roles in bays and estuaries. Eelgrass beds dampen wave and current action, trap suspended particulates, and reduce erosion by stabilizing the sediment. Eelgrass beds also improve water clarity, cycle nutrients, and generate oxygen during daylight hours.
22. The unauthorized discharge of fill and exposure of a sandy beach causes and threatens to cause a condition of pollution by directly affecting waters used for beneficial uses. Shoreline erosion of the newly exposed beach threatens beneficial uses by reducing water clarity necessary for the growth of eelgrass. Additionally, the redistribution of sediment from shoreline erosion threatens to degrade the eelgrass beds by covering and smothering the beds within the shallow waters of San Diego Bay.
23. The discharge or deposit of sand, soil and sediment into waters of the state constitute "waste" as defined in CWC section 13304. The Dischargers, through this activity, have discharged waste and created a condition where waste continues to be discharged into waters of the U.S./state where it has caused and/or threatens to cause a condition of pollution or nuisance by increasing levels of sediment, and settleable and suspended material. The discharge of waste to the waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance is also a violation of Basin Plan Prohibitions.
24. Cleanup and abatement action is necessary to ensure that the unauthorized discharges from the project cease to cause and threaten to cause conditions of pollution. Because cleanup and abatement activity will occur within and adjacent to San Diego Bay, best management measures during remedial action are necessary to prevent further conditions that threaten beneficial uses of San Diego Bay.

25. Pursuant to Water Code Section 13304, the Regional Board is entitled to, and may seek reimbursement for, all reasonable costs it actually incurs to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order.
26. Dischargers have been required by this Order to clean up and abate the impacts of their unauthorized discharges since August 23, 2006. Nevertheless, Dischargers have yet to stabilized the shoreline and prevent further discharge.
27. In accordance with Water Code section 13267 (b), these findings provide Dischargers with a written explanation with regard to the need for remedial action and reports and identify the evidence that supports the requirement to implement cleanup and abatement activities and submit the reports.
28. This enforcement action is being taken for the protection of the environment and, as such, is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 2100 Et seq.) in accordance with Section 15321 (Enforcement Actions by Regulatory Agencies), Chapter 3, Title 14 of the California Code of Regulations.

IT IS HEREBY ORDERED that, pursuant to Section 13304 and Section 13267 of Division 7 of the California Water Code, the *Dischargers* shall:

1. Cease the discharge of sand, soil and sediment to waters of the state and clean up and abate the condition of the unauthorized discharge of fill to San Diego Bay in accordance with the schedule below.
2. By May 1, 2008, cleanup and abate existing and threatened pollution associated with the unauthorized discharge of fill to San Diego Bay by restoring and stabilizing the affected area to its pre-project condition or receive written approval from the Regional Board for an alternative Cleanup and Restoration Plan and Schedule.
3. By July 2, 2007, stabilize the shoreline by returning the site to conditions similar to those that existed prior to the project by replacing riprap, in accordance with any Port of San Diego specifications and design standards. The Dischargers shall obtain all necessary approvals and permits prior to commencing shore stabilization activities.
4. The *Dischargers* shall submit within sixty days of completion of Directive No. 2, a Cleanup and Abatement Progress Report that documents that the required on-site cleanup and abatement actions have been completed and that the stabilization measures have been constructed as authorized. If Directive No. 2 is

not completed by May 1, 2008, then the Dischargers shall submit a report by June 1, 2008, and monthly thereafter until Directive No. 2 is completed.

5. By December 22, 2006, the *Dischargers* shall submit an Eelgrass Impact Assessment Report for the area of Bay impacted by the discharge. The report shall thoroughly map the area and distribution of existing eelgrass beds and delineate and quantify any impacts to eelgrass as a result of construction of the project.
6. Continue to submit monthly Eelgrass Impact Assessment Reports by the 15th of each month with the first monthly assessment report being due on June 15, 2007, for the area of the Bay impacted by the discharge as determined by the Regional Board. If the Regional Board determines that eelgrass has been negatively impacted by the unauthorized discharge, then Dischargers shall prepare and submit an eelgrass mitigation plan consistent with the Southern California Eelgrass Mitigation Policy (adopted July 31, 1991). This mitigation plan shall be prepared by a qualified Biologist/Environmental Consultant with at least five years of experience in the field of eelgrass mitigation/restoration.
7. With each report required by this Order, provide under penalty of perjury under the laws of California a "Certification" statement to the Regional Board.

The "Certification" shall include the following signed statement:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. Pursuant to California Water Code Section 13350, any person who intentionally or negligently violates a cleanup and abatement order may be liable civilly in an amount which shall not exceed five thousand dollars (\$5,000), but shall not be less than five hundred dollars (\$500), for each day in which the cleanup and abatement order is violated.

NOTIFICATIONS

1. Requirements established pursuant to Water Code Sections 13304 and 13267(b) are enforceable when signed by the Executive Officer of the Regional Board.

2. The Regional Board reserves its right to take any enforcement action authorized by law for violations, including but not limited to, violations of the terms and conditions of Section 401 Water Quality Certification No. 05C-041 or this Cleanup and Abatement Order.
3. Pursuant to California Water Code section 13350, any person who intentionally or negligently violates a cleanup and abatement order may be liable civilly in an amount which shall not exceed five thousand dollars (\$5,000), but shall not be less than five hundred dollars (\$500), for each day in which the cleanup and abatement order is violated. The Regional Board reserves the right to take any enforcement action authorized by law.
4. Pursuant to California Water Code section 13268, any person failing or refusing to furnish technical or monitoring program reports as required by Section 13267, or falsifying any information provided therein, is guilty of a misdemeanor, and may be liable civilly in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
5. The Discharger shall reimburse the State of California for all reasonable costs actually incurred by the Regional Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Cleanup and Abatement Order, according to billing statements prepared from time to time by the State Water Resources Control Board.
6. The Discharger shall properly manage, store, treat, and dispose of contaminated soils and ground water in accordance with applicable federal, state, and local laws and regulations. The storage, handling, treatment, or disposal of soil containing waste constituents and polluted groundwater shall not create conditions of pollution, contamination or nuisance as defined in California Water Code section 13050(m). The Discharger shall, obtain, or apply for coverage under waste discharge requirements or a conditional waiver of waste discharge requirements for any discharge of the waste to (a) land for treatment, storage, or disposal or (b) waters of the state.
7. The Discharger(s) shall provide documentation that plans and reports required under this Cleanup and Abatement Order are prepared under the direction of appropriately qualified professionals. California Business and Professions Code Sections 6735, 7835 and 7835.1 require that engineering and geologic evaluations and judgments be performed by or under the direction of registered professionals. The Discharger(s) shall include a statement of qualifications and registration numbers, if applicable, of the responsible lead professionals in all plans and reports required under this Cleanup and Abatement Order. The lead professional shall sign and affix their registration stamp, as applicable, to the report, plan, or document.

May 10, 2007

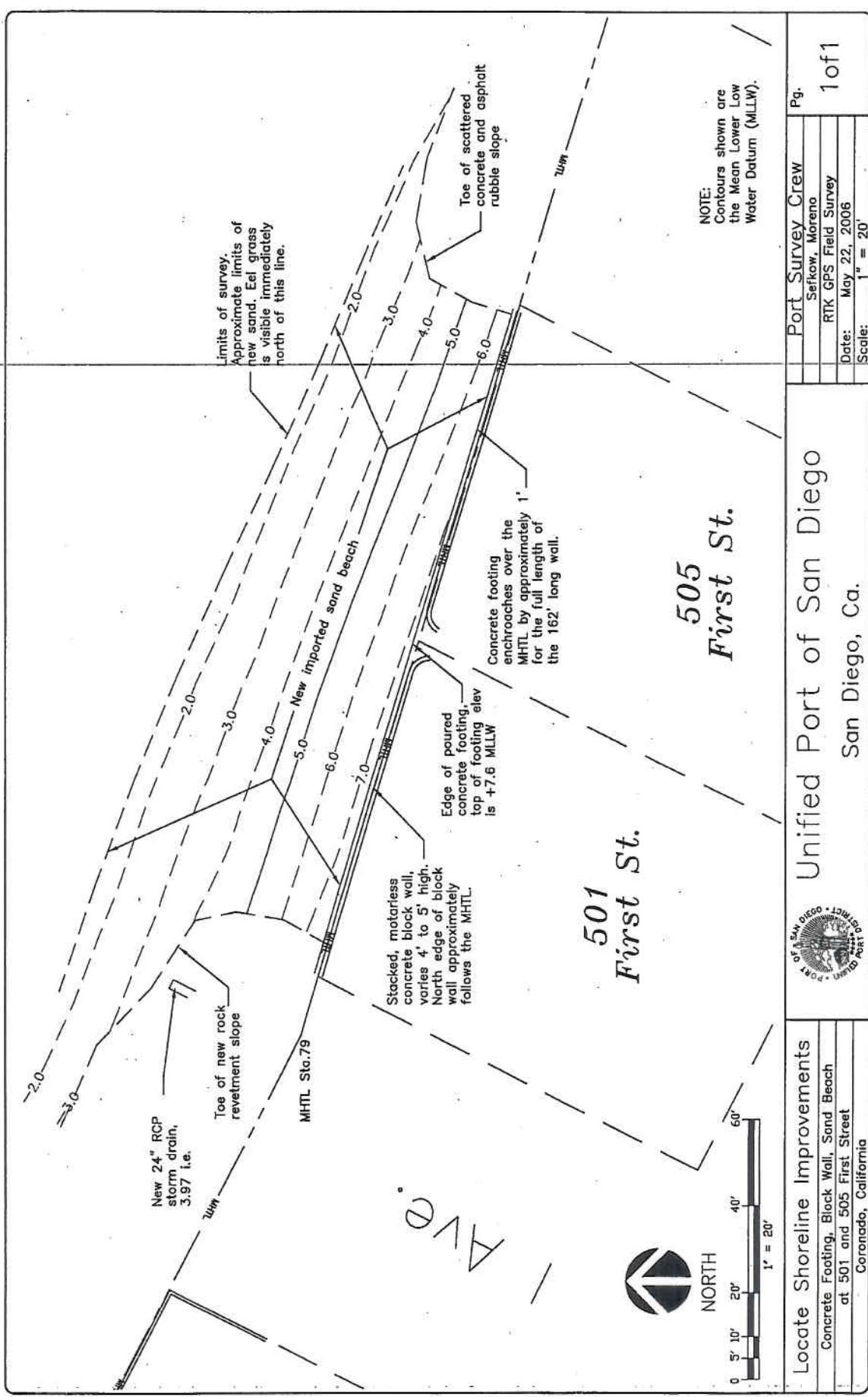
8. The Discharger shall submit both electronic and paper copies of all workplans, technical reports, and monitoring reports required under this Cleanup and Abatement Order in accordance with Water Code Section 13196, Electronic Submission of Reports. Electronic submission shall be in PDF format, and include the signed transmittal letter and professional certification.
9. All reports required under this Cleanup and Abatement Order shall be signed and certified by the Discharger(s) or by a duly authorized representative of the Discharger(s) and submitted to the Regional Board. A person is a duly authorized representative only if: 1) The authorization is made in writing by the Discharger; and 2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.).
10. All monitoring and technical reports required under this Cleanup and Abatement Order shall be submitted to:

Executive Officer
Attn: Southern Watershed Protection Unit
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340
11. FAILURE TO COMPLY WITH THE PROVISIONS OF THIS ORDER MAY SUBJECT YOU TO FURTHER ENFORCEMENT ACTION, INCLUDING BUT NOT LIMITED TO, ASSESSMENT OF CIVIL LIABILITY UNDER SECTIONS 13268 AND 13350 OF THE CALIFORNIA WATER CODE AND REFERRAL TO THE DISTRICT ATTORNEY OR ATTORNEY GENERAL FOR INJUNCTIVE RELIEF AND CIVIL OR CRIMINAL LIABILITY.

I, John H. Robertus, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of Cleanup and Abatement Order No. R9-2006-0101 as issued by the Executive Officer and as amended by Addendum Nos. 1 and 2.


JOHN H. ROBERTUS
Executive Officer

May 10, 2007
Date



Locate Shoreline Improvements
Concrete Footing, Block Wall, Sand Beach
at 501 and 505 First Street
Coronado, California



Unified Port of San Diego
San Diego, Ca.

Port Survey Crew
Sefkow, Moreno
RTK GPS Field Survey
Date: May 22, 2006
Scale: 1" = 20'

Attachment No. 1 Port Survey

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

**CLEANUP AND ABATEMENT ORDER NO. R9-2006-0102
AS AMENDED BY ADDENDUM NOS. 1 AND 2**

FOR

**LARRY & PENNY GUNNING
AND
PERRY & PAPENHAUSEN, INC. (AKA PERRY & PAPENHAUSEN
CONSTRUCTION)**

The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board), finds that:

1. On August 23, 2006, the Regional Board Executive Officer issued Cleanup and Abatement Order (CAO) No. R9-2006-0102 to Larry and Penny Gunning and Perry and Papenhausen Construction (hereafter *Dischargers*) for unauthorized discharge of fill to San Diego Bay.
2. On October 13, 2006, the Regional Board Executive Officer issued Addendum No. 1 to CAO R9-2006-0102.
3. This second addendum to CAO No. R9-2006-0102 (Order) has been prepared to address the continued discharge of fill into San Diego Bay that has resulted from the unauthorized removal of riprap at 505 First Street in the City of Coronado and the construction of an unauthorized seawall at the same address. This Order supersedes and amends all previously issued version of CAO No. R9-2006-0102.
4. This Cleanup and Abatement Order is based on: (1) Chapter 5, Enforcement and Implementation commencing with Section 13300, of the Porter-Cologne Water Quality Control Act (Water Code) (Division 7 of the Water Code, commencing with Section 13000); (2) Water Code Section 13267, Investigations and Inspections, Chapter 4, Regional Water Quality Control; (3) all applicable provisions of the *Water Quality Control Plan for the San Diego Basin* (Basin Plan) adopted by the Regional Board including beneficial uses, water quality objectives, and implementation plans; (4) State Water Board Resolution No. 68-16 (*Statement of Policy with Respect to Maintaining High Quality of Waters in California*); (5) State Water Board Resolution No. 92-49 (*Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304*); and all other applicable legal authority.

5. Larry and Penny Gunning are the owners of the property located at 505 First Street, Coronado, San Diego County.
 6. Perry & Papenhausen Construction, Contractor License No. 830775, is the construction firm hired by the Larry and Penny Gunning to remove existing shoreline riprap and construct a seawall and associated concrete footing at the shore side of the property at 505 First Street, in the City of Coronado, San Diego County.
-
7. Designated existing beneficial uses of coastal waters for San Diego Bay in the Water Quality Control Plan for the San Diego Basin (Basin Plan) include, Industrial Service Supply (IND), Navigation (NAV), Contact Water Recreation (REC 1), Non-contact Water Recreation (REC 2), Commercial and Sport Fishing (COMM), Preservation of Biological Habitats of Special Significance (BIOL), Estuarine Habitat (EST), Wildlife Habitat (WILD), Rare, Threatened or Endangered Species (RARE), Marine Habitat (MAR), Migration of Aquatic Organisms (MIGR) and Shellfish Harvesting (SHELL).
 8. The San Diego Unified Port District (The Port) has jurisdiction over tidelands below the Mean High Tide Line (MHTL) in San Diego Bay, including those directly adjacent to the property at 501 First Street. The State Legislature has conveyed to the Port the authority to act as trustee for the administration and protection of these tidelands in San Diego Bay.
 9. On or about May 1, 2006, *Dischargers* began removal of the existing riprap on the shoreline fronting 505 First Street using an excavator.
 10. On or about May 8, 2006, *Dischargers* excavated soils, natural sand and debris about 48 inches wide and along the entire length of the northern property line for 505 First Street to accommodate the forms for the footing associated with the construction of an unauthorized seawall.
 11. On or about May 15, 2006, the *Dischargers* initiated construction of a 4 - 5 ft. high stacked, mortarless, concrete block wall (seawall), and a poured concrete footing directly adjacent to the seawall within waters of the U.S./State. Construction of the seawall was initiated in concert with the adjacent property at 501 First Street, in Coronado. The construction of the seawall and concrete footing is a discharge of waste to waters of the U.S./State in violation CWC Section 13260¹.

¹ Pursuant to CWC section 13260, "any person discharging waste or proposing to discharge waste, within any region that could affect the quality of the waters of the state..." shall file a report of waste discharge. The Regional Board has not received a 401 application or report of waste discharge for wastes discharged at the site.

12. On May 22, 2006, a Port of San Diego survey crew determined that the 162 foot seawall's north edge roughly follows the Mean High Tide Line (MHTL) for its entire length. The Port survey also found that the poured concrete footing encroaches onto Port of San Diego property by approximately 1 foot for the entire length of the footing. Attachment No. 1 is a diagram depicting the results of the Port of San Diego survey of the site.
13. On June 12, 2006, a compliance inspection was conducted by Regional Board Staff. The inspection found that *Dischargers* had removed riprap from the shoreline on the bayside of 505 First Street and that an unauthorized seawall had been constructed along the property line of 501 and 505 First Street. The construction of the seawall and concrete footing and removal of riprap created an area of unstabilized sandy beach in San Diego Bay between approximately +2.0 ft. and +7.0 ft. MLLW.
14. Section 13304 (a) of the California Water Code provides that:

Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a regional board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.
15. Clean Water Act (CWA) section 404 requires any person proposing to discharge dredge or fill material into navigable water of the United States to obtain a Section 404 permit prior to such discharge. CWA section 401 requires that any person obtaining a Section 404 permit, obtain water quality certification from the

State in which the discharge occurs. California Water Code section 13376 requires that any person who is proposing to discharge pollutants or dredged or fill material into water of the state to submit a report of waste discharge pursuant to California Water Code section 13260 prior to such discharge. The *Dischargers* failed to obtain a section 404 permit and section 401 Water Quality Certification, and failed to file a Report of Waste Discharge for the removal of riprap and dredge and fill activities associated with the construction of the sea wall. Furthermore, *Dischargers* unauthorized activities are in violation of Basin Plan prohibitions.

16. Eelgrass (*Zostera Marina*) beds occur in shallow water directly adjacent to the sandy beach created by the project. Eelgrass vegetated areas are recognized as important ecological communities in shallow bays and estuaries because of their multiple biological and physical values. Eelgrass habitat functions as an important structural environment for resident bay and estuarine species, offering both predation refuge and a food source. Eelgrass functions as a nursery area for many commercially and recreational important finfish and shellfish species that are resident within bays and estuaries, as well as oceanic species that enter estuaries to breed or spawn. Eelgrass is a major food source in near shore marine systems, contributing to the system at multiple trophic levels. In addition to the habitat and resource value of Eelgrass, it serves beneficial physical roles in bays and estuaries. Eelgrass beds dampen wave and current action, trap suspended particulates, and reduce erosion by stabilizing the sediment. Eelgrass beds also improve water clarity, cycle nutrients, and generate oxygen during daylight hours.
17. The unauthorized discharge of fill and exposure of a sandy beach causes and threatens to cause a condition of pollution by directly affecting waters used for beneficial uses. Shoreline erosion of the newly exposed beach threatens beneficial uses by reducing water clarity necessary for the growth of eelgrass. Additionally, the redistribution of sediment from shoreline erosion threatens to degrade the eelgrass beds by covering and smothering the beds within the shallow waters of San Diego Bay.
18. The discharge or deposit of sand, soil and sediment into water of the state constitute "waste" as defined in California Water Code section 13304. The *Dischargers*, through this activity, have discharged waste and created a condition where waste continues to be discharged into waters of the U.S./State where it has caused and/or threatens to cause a condition of pollution or nuisance by increasing levels of sediment, and settleable and suspended material. The discharge of waste to the waters of the State in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance is also a violation of Basin Plan prohibitions.

19. *Dischargers* have been required by this Order to clean up and abate the impacts of their unauthorized discharges since August 23, 2006. Nevertheless, *Dischargers* have yet to stabilize the shoreline and prevent further discharge.
20. Cleanup and abatement action is necessary to ensure that the unauthorized discharges from the project cease to cause and threaten to cause conditions of pollution. Because cleanup and abatement activity will occur within and adjacent to San Diego Bay, best management measures during remedial action are necessary to prevent further conditions that threaten beneficial uses of San Diego Bay.
21. Pursuant to Water Code Section 13304, the Regional Board is entitled to, and may seek reimbursement for, all reasonable costs it actually incurs to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order.
22. In accordance with Water Code section 13267 (b) these findings provide *Dischargers* with a written explanation with regard to the need for remedial action and reports and identify the evidence that supports the requirement to implement cleanup and abatement activities and submit the reports.
23. This enforcement action is being taken for the protection of the environment and, as such, is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 2100 Et seq.) in accordance with Section 15321 (Enforcement Actions by Regulatory Agencies), Chapter 3, Title 14 of the California Code of Regulations.

IT IS HEREBY ORDERED that, pursuant to Section 13304 and Section 13267 of Division 7 of the California Water Code, the *Dischargers* shall:

1. Cease the discharge of sand, soil and sediment to water of the state and clean up and abate the condition of unauthorized discharge of fill to San Diego Bay in accordance with the schedule below.
2. By May 1, 2008, cleanup and abate existing and threatened pollution associated with the unauthorized discharge of fill to San Diego Bay by restoring and stabilizing the affected area to its pre-project condition or receive written approval from the Regional Board for an alternative Cleanup and Restoration Plan and Schedule.
3. By July 2, 2007, stabilize the San Diego Bay shoreline by returning it to conditions similar to those that existed prior to the project by replacing riprap, in accordance with any Port of San Diego specifications and design standards. The

Dischargers shall obtain all necessary approvals and permits prior to commencing shore stabilization activities.

4. The *Dischargers* shall submit within sixty days of completion of Directive No. 2, a Cleanup and Abatement Progress Report that documents that the required on-site cleanup and abatement actions have been completed and that the stabilization measures have been constructed as authorized. If Directive No. 2 is not completed by May 1, 2008, then the *Dischargers* shall submit a report by June 1, 2008, and monthly thereafter until Directive No. 2 is completed.

5. By December 22, 2006, the *Dischargers* shall submit an Eelgrass Impact Assessment Report for the area of Bay impacted by the discharge. The report shall thoroughly map the area and distribution of existing eelgrass beds and delineate and quantify any impacts to eelgrass as a result of construction of the project.
6. Continue to submit monthly Eelgrass Impact Assessment Reports by the 15th of each month with the first monthly assessment report being due on June 15, 2007, for the area of the Bay impacted by the discharge as determined by the Regional Board. If the Regional Board determines that eelgrass has been negatively impacted by the unauthorized discharge, then *Dischargers* shall prepare and submit an eelgrass mitigation plan consistent with the Southern California Eelgrass Mitigation Policy (adopted July 31, 1991). This mitigation plan shall be prepared by a qualified Biologist/Environmental Consultant with at least five years of experience in the field of eelgrass mitigation/restoration.
7. With each report required by this Order, provide under penalty of perjury under the laws of California a "Certification" statement to the Regional Board.

The "Certification" shall include the following signed statement:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. Pursuant to California Water Code Section 13350, any person who intentionally or negligently violates a cleanup and abatement order may be liable civilly in an amount which shall not exceed five thousand dollars (\$5,000), but shall

not be less than five hundred dollars (\$500), for each day in which the cleanup and abatement order is violated.

NOTIFICATIONS

1. Requirements established pursuant to Water Code Sections 13304 and 13267(b) are enforceable when signed by the Executive Officer of the Regional Board.
2. The Regional Board reserves its right to take any enforcement action authorized by law for violations, including but not limited to, violations of the terms and conditions of this Cleanup and Abatement Order.
3. Pursuant to California Water Code section 13350, any person who intentionally or negligently violates a cleanup and abatement order may be liable civilly in an amount which shall not exceed five thousand dollars (\$5,000), but shall not be less than five hundred dollars (\$500), for each day in which the cleanup and abatement order is violated.
4. Pursuant to California Water Code section 13268, any person failing or refusing to furnish technical or monitoring program reports as required by Section 13267, or falsifying any information provided therein, is guilty of a misdemeanor, and may be liable civilly in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
5. The Discharger shall reimburse the State of California for all reasonable costs actually incurred by the Regional Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Cleanup and Abatement Order, according to billing statements prepared from time to time by the State Water Resources Control Board.
6. The Discharger shall properly manage, store, treat, and dispose of contaminated soils and ground water in accordance with applicable federal, state, and local laws and regulations. The storage, handling, treatment, or disposal of soil containing waste constituents and polluted groundwater shall not create conditions of pollution, contamination or nuisance as defined in California Water Code section 13050(m). The Discharger shall, obtain, or apply for coverage under waste discharge requirements or a conditional waiver of waste discharge requirements for any discharge of the waste to (a) land for treatment, storage, or disposal or (b) waters of the state.
7. The Discharger(s) shall provide documentation that plans and reports required under this Cleanup and Abatement Order are prepared under the direction of appropriately qualified professionals. California Business and Professions Code

Sections 6735, 7835 and 7835.1 require that engineering and geologic evaluations and judgments be performed by or under the direction of registered professionals. The Discharger(s) shall include a statement of qualifications and registration numbers, if applicable, of the responsible lead professionals in all plans and reports required under this Cleanup and Abatement Order. The lead professional shall sign and affix their registration stamp, as applicable, to the report, plan, or document.

8. The Discharger shall submit both electronic and paper copies of all workplans, technical reports, and monitoring reports required under this Cleanup and Abatement Order in accordance with Water Code Section 13196, Electronic Submission of Reports. Electronic submission shall be in PDF format, and include the signed transmittal letter and professional certification.
9. All reports required under this Cleanup and Abatement Order shall be signed and certified by the Discharger(s) or by a duly authorized representative of the Discharger(s) and submitted to the Regional Board. A person is a duly authorized representative only if: 1) The authorization is made in writing by the Discharger; and 2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.).
10. All monitoring and technical reports required under this Cleanup and Abatement Order shall be submitted to:

Executive Officer
Attn: Southern Watershed Protection Unit
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340


11. FAILURE TO COMPLY WITH THE PROVISIONS OF THIS ORDER MAY SUBJECT YOU TO FURTHER ENFORCEMENT ACTION, INCLUDING BUT NOT LIMITED TO, ASSESSMENT OF CIVIL LIABILITY UNDER SECTIONS 13268 AND 13350 OF THE CALIFORNIA WATER CODE AND REFERRAL TO THE DISTRICT ATTORNEY OR ATTORNEY GENERAL FOR INJUNCTIVE RELIEF AND CIVIL OR CRIMINAL LIABILITY.

CAO R9-2006-0102
AS AMENDED BY ADDENDUM NOS. 1 AND 2

9

May 10, 2007

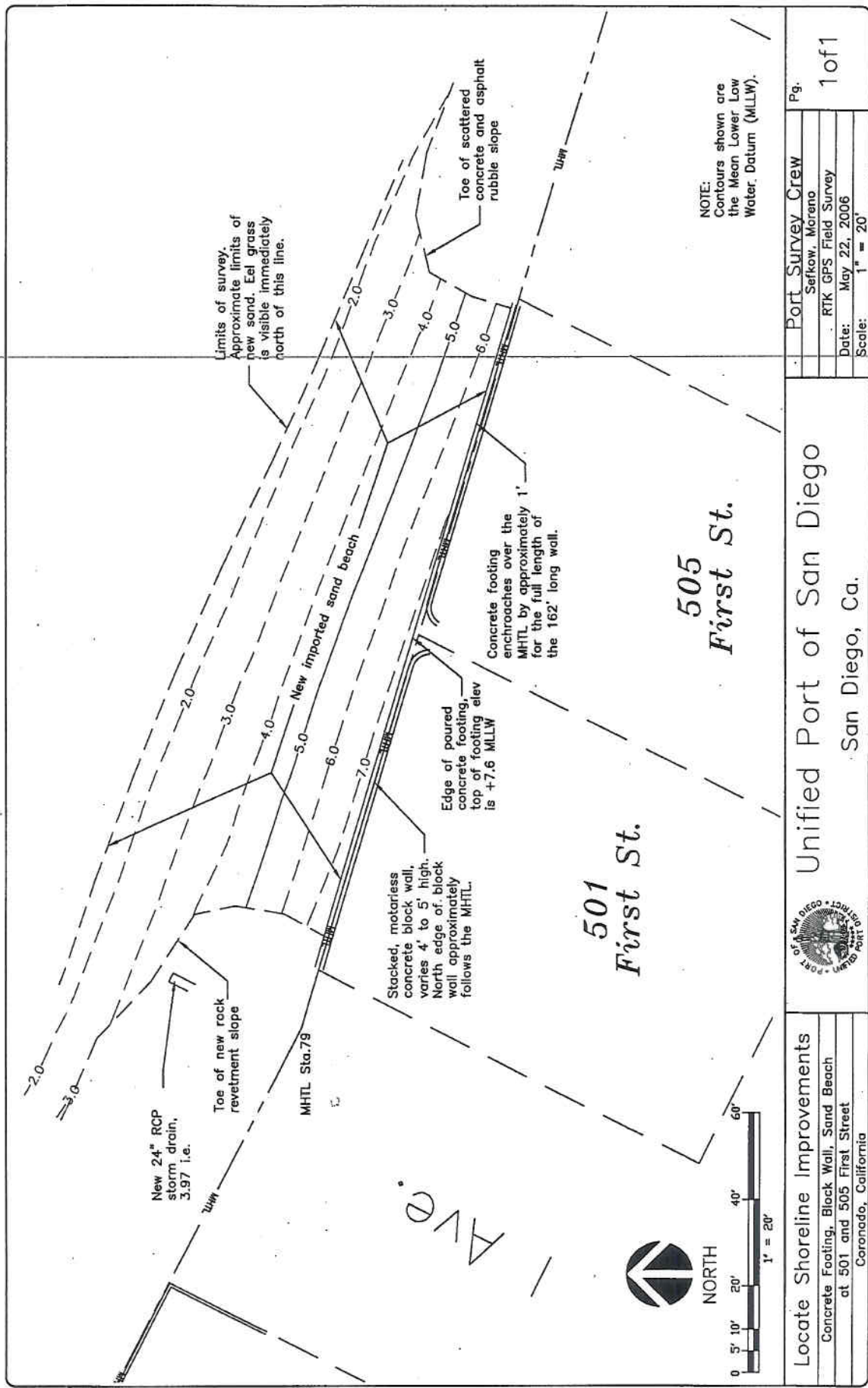
I, John H. Robertus, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of Cleanup and Abatement Order No. R9-2006-0102 as issued by the Executive Officer as amended by Addendum Nos. 1 and 2.




JOHN H. ROBERTUS
Executive Officer

May 10, 2007
Date

CAO R9-2006-0102 A1 A2.doc



| | | | |
|--|---|----------------------|--------|
| Locate Shoreline Improvements |  <div>Unified Port of San Diego San Diego, Ca.</div> | Port Survey Crew | Pg. |
| Concrete Footing, Block Wall, Sand Beach | | Serkow, Moreno | |
| at 501 and 505 First Street | | RTK GPS Field Survey | |
| Coronado, California | | Date: May 22, 2006 | 1 of 1 |
| | | Scale: 1" = 20' | |

Attachment No. 1 Port Survey

Exhibit C



Storm Water Discharge
from City Park

501 & 505 First Street